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Supreme Court of the United States

SUSAN BALDWIN,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Baldwin files this reply to address certain legal arguments made in Blue Cross/Blue Shield of Alabama's Brief in Opposition to the Writ of Certiorari.

LEDBETTER V. THE GOODYEAR TIRE AND RUBBER COMPANY, ___ U.S. ___ , STRESSES IMPORTANCE OF THE STATUTORY 180 DAY REQUIREMENT

Baldwin waited 105 days (July 26, 2001–November 8, 2001) from the first request for sex until she complained to the Blue Cross/Blue Shield's Human Resources department. The Court of Appeals held that Baldwin's failure to report harassment sooner than 105 days establishes the second element of the affirmative defense. (App. B, 32a) Title VII of the Civil Rights Act of 1964 provides, depending on the state, either 180 days or 300 days to challenge an employment practice. 42 U.S.C. § 2000e-5(e)(1). Alabama, without any State or local agency to address such matters, falls into the 180 day category.

In *Ledbetter v. Goodyear Tire and Rubber Company*, __ U.S. __, 127 S. Ct. 2162 (2007), Justice Alito, writing for the Court, emphasized the importance of filing a timely charge of discrimination within 180 days after the alleged unlawful practice to comply with the statutory guidelines. The Court acknowledged that the 180 day deadline is "short by any measure" and "reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 2170-2171.

These Congressionally mandated time periods for making complaints should not by shortened by judicial fiat. Showing Baldwin the exit to the courthouse – at summary judgment – and holding as a matter of law that waiting 105 days from the first instance of sexual harassment entitles Blue Cross/Blue Shield to an affirmative defense is an expansive reading of the *Faragher/Ellerth* defense which is unsupported in the text of Title VII of The Civil Rights Act of 1964, as amended, and the opinions by this Court.

JURY SHOULD DECIDE REASONABLENESS

Blue Cross/Blue Shield endorses the Eleventh Circuit's determination that "reasonable remedial measures" [counseling with the alleged harasser, transfer, or termination] were offered and Baldwin's "unreasonable failure to take advantage of corrective opportunities" was enough to "carry the day" for Blue Cross/Blue Shield at the summary judgment stage. *(See* BIO pg. 12-13)

Understandably, defendants seeking an early ending of sexual harassment cases want Courts to exclusively analyze the plaintiffs' actions in the context of the affirmative defense. However, judgments about reasonableness are considered the province of the jury. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999) ("A reasonableness standard regardless of the modifier, transforms every disciplinary decision into a jury question." (Kennedy, J. dissenting)). *See also U.S. v. Gray*, 367 F.3d 1263, 1269 (11th Cir. 2004) citing *Bryan v. Jones*, 530 F.2d 1210, 1218 (5th Cir. 1976), Wisdom, J., concurring in part and dissenting in part ("**reasonableness is basically a jury question**; it is a concept that loses meaning when courts try to pin it down.") (emphasis added); *Reed v. MBNA Marketing Systems, Inc.*, 333 F. 3d 27, 34 (11th Cir. 2003) (" Summary judgment for

the employer is still possible so long as raw facts are undisputed or assumed in favor of the plaintiff. Even then, however, the judgment call as to reasonableness is itself a jury issue unless no reasonable jury could decide it in the plaintiff's favor. *Mota v. The University of Texas Houston*, 261 F.3d 512, 526 (5th Cir. 2001).").

In the *Mota* case, the Fifth Circuit allowed a delay of nine months prior to reporting harassment. *See Mota v. The University of Texas Houston*, 261 F.3d 512, 526 (specifically finding that the delay of nine months in reporting harassment is not unreasonable in the face of retaliation threats). The 5th Circuit noted that a delay of three months is not unreasonable. *Id.*

As noted by the District Court, Baldwin, who worked for Blue Cross/Blue Shield (not Scott Head) for twelve years, explained why she waited over three months to report on-going harassment:

> I had some very specific career goals. I had a career path that I was trying to travel down and that was to be promoted to the next level of account executive. I didn't want anything, including any comments that were made, any sexual innuendos, any gestures, anything that would appear to not have me fit into the group. I didn't want anything to get into the way of my being promoted.

(App. C, 49a)

After a business dispute, on September 26, 2001, Head informed Baldwin, "Don't you ever fucking go over my head.

You'll fucking lose your job, with his finger pointed in my face as he's screaming at me." (App. C, 48a)[1]

The Court of Appeals rejected Baldwin's explanation and determined that Baldwin waited too long to report harassment, declined to participate in counseling with the alleged harasser, and refused the transfer, thus she was unreasonable as a matter of law. (App. B, 33a)

Baldwin's alleged unreasonable conduct as a matter of law needs to be examined in the context that any investigation did not commence until three weeks after she made her complaints known. (App. C, 53a) After her initial complaint, Baldwin was not interviewed as part of the investigation. *Id.* The determination that there was no merit to her complaint was made, after a discussion on the two hour car ride home, by Rick King. *Id.*

Emma Barclay, one of the HR officials, who participated in the investigation, testified that she did not recall King discussing anything about Head's interview on the way home. (App. C, 53a) Barclay also recalls that at least one of the witness's answers seemed rehearsed. (App. C, 52a)

Baldwin was asked by Rick King, Vice-President and HR compliance manager, to attend counseling with Scott Head,

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[1] According to Head, other male marketing representatives also complained to him about Baldwin's work conduct in that "if the rules worked in her favor, great, if they didn't she would attempt to spin it another way to so she could get **her claws** into it." (App. C, 50a)

her alleged harasser, "to mold and shape his behavior." (App. C, 55a)[2]

Blue Cross also emphasizes Baldwin's "flat refusal" to work with Scott Head. (BIO pg. 12) However, Head also testified that Baldwin had never refused to report to him or show up for work. (App C, 58a)

Blue Cross/Blue Shield's termination letter describes a disagreement among co-workers, not between supervisor and subordinate, and faulted Baldwin for "failing to assume any responsibility for the deterioration of your relationship with Mr. Head." (App. C, 57a)

AFFIRMATIVE DEFENSE PROVIDES GUIDANCE TO JURIES

In *Harris v. Forklift*, 510 U.S. 17, 21-22 (1993), this Court recognized that Title VII "comes into play before a nervous breakdown" and that juries decide whether sexual harassment was objectively severe or pervasive. Justice Scalia, in a concurring opinion expressed that, "As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." *Harris* at 24. Of course, since that time this Court

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[2] Baldwin contends that an issue of fact remains as to whose behavior Blue Cross sought "to mold and shape" as Head did not recall being asked to attend any counseling. (App. C, 58a) Baldwin was also confronted with Hudgins, the District manager informing her that "Scott is the manager. I support him. He will be here for a very long time. You brought charges, [and] they're not [corroborated]. It's over. I can't have strife in the office." (App. C, 56a)

has provided additional guidance in the form of the *Ellerth/Faragher* affirmative defense for juries to determine whether a damage award is appropriate.

In 6th Amendment cases, there has been a renewed recognition of the juries role in the criminal context. *See Rita v. United States*, __U.S. ___, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) (Noting that facts necessary to support a sentence beyond the maximum must be established by a guilty plea or proved to jury beyond a reasonable doubt.). Civil litigants should receive the same opportunities to prove their case with respect to inferences from key facts to a jury rather than have those facts determined at summary judgment, which is improper.

The Court should grant the Writ of *Certiorari* because the Eleventh Circuits's opinion in this case lowers the bar on what is acceptable work place conduct while simultaneously expanding the scope of the affirmative defense.

CONCLUSION

A Writ of *Certiorari* should be issued to review the judgment and opinion of the Eleventh Circuit Court of Appeals and determine whether summary judgment was properly entered on Baldwin's claims. As noted, the time period allowed for reporting harassment is demonstrably shorter than what is allowed in other circuits and even shorter than the limitations contained in Title VII of the Civil Rights Act of 1964.

For the reasons in this Reply brief and those in the original Petition for Writ of *Certiorari*, the Court should grant *certiorari* in this case.

Respectfully Submitted,

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